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No. 91-1382

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., *et al.*,

*Petitioners,*

—v.—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

This brief is submitted by petitioners (i) in reply to the briefs in opposition of the municipal defendants-respondents, and of the intervenor-defendant-respondent, Save The Theatres, Inc., and (ii) in further support of their petition for a writ of certiorari herein.

Both respondents oppose the petition on the ground of alleged prematurity. As to the merits, the municipal respondents take the position, as did the courts below, that *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), ends inquiry as to an as-applied challenge to a landmarks law. The intervenor respondent instead argues that the courts below did attempt to comply with their responsibility under *Penn Central* and other precedents of this Court. It is submitted that (i) the municipal respondents' position is in

direct conflict with, and manifests a fundamental misinterpretation and misunderstanding of, the opinions of this Court; and (ii) the intervenor's position is belied by the record.

## THE QUESTIONS HERE RAISED BY PETITIONERS ARE RIPE FOR REVIEW

In consideration of the questions presented for review, it is necessary to distinguish between as-applied claims and facial challenges, the latter not being subject to a ripeness objection (*Yee* v. *City of Escondido*, ____ U.S. ____, 60 U.S.L.W. 4301 [1992]; *Pennell* v. *City of San Jose*, 485 U.S. 1 [1988]; *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 [1987]; *Agins* v. *Tiburon*, 447 U.S. 255 [1980]). No issue of ripeness thus bars consideration of the facial challenges presented by the petition.

Furthermore, respondents' prematurity argument to petitioners' as-applied challenges is without merit. It is premised on the petitioners' lack of an application for a hardship exemption under the Landmarks Law (§ 25-309, Pet. App. 62a-70a). Relief under the hardship exemption, however, is not available unless the property owner can demonstrate that the property does not provide a "reasonable return", defined as six per cent of assessed valuation (§ 25-302[v], Pet. App. 50a).[1] The hardship provision thus does not recognize any other possibility of an unconstitutional uncompensated taking arising under any circumstances whatsoever, despite the undeniable burdens on the use of the property, and the diminished value or profitability of the property. The hardship exemp-

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1 In fact, the return provided for under this provision is significantly less than it would facially appear. New York City property is assessed at 45% of market value. Thus, property returning as little as 2.7% of market value will be denied a hardship exemption. Without belaboring the point at this time, it is respectfully submitted that this test is insufficient to meet constitutional requirements. This issue was raised and considered at some length below (Pet. App. 28a-31a), and if certiorari is granted, will be fully aired here (*cf.* the amicus brief in support of the petition submitted by the New York Board of Realtors, Inc.).

tion therefore does not offer the opportunity for relief from a taking, unless the taking consists of a virtual total diminution in value. This, however, is precisely the simplistic bright-line test that *Penn Central* and numerous other opinions of this Court caution against.[2] Moreover, any hardship hearing under the landmarks law would not involve consideration of the manifold factors this Court has determined are necessary to a determination of whether a regulation of property has gone "too far" and become an uncompensated taking.[3]

A taking should be subject to challenge at the time of the taking, and since that is the time of the designation, then that is when the challenge should be made.[4] To require a second separate proceeding before the same agency, particularly

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2 The municipal respondents make passing references (Br. 2, 28) to the existence of other exemptions, namely a Certificate of No Effect (§ 25-306, Pet. App. 58a-59a) or a Certificate of Appropriateness (§ 25-307, Pet. App. 59a-61a). There, however, the only factors the Commission may consider are aesthetic ones, not even reasonable return, to say nothing of any other factors relevant to a takings analysis. In any event, the Commission lacks the power to grant exemption under these sections to many landmark modifications. For instance, the gutting of an interior-landmarked building could not possibly be granted a Certificate of No Effect, because it certainly does have an effect; nor could a Certificate of Appropriateness be granted, because destruction certainly is inappropriate to the "protection, enhancement, perpetuation and use" of the protected features, the statutory test (§ 25-307[d], Pet. App. 61a). See *Lutheran Church* v. *City of New York*, 35 N.Y.2d 121, 124, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

3 The exemption process here thus differs from the variance procedure under most zoning and other regulatory schemes, which typically allow the reviewing entity to consider any and all relevant factors. See, *e.g.*, *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank*, 473 U.S. 172 (1985), heavily relied upon by both respondents' briefs, where the Court quoted the regulation allowing a variance " 'where the subdivider can show that strict adherence to these regulations would cause unnecessary hardship' " (at 188 n.9).

4 This Court in *Penn Central* (438 U.S. at 132) noted the limitations placed upon a later challenge by the failure there of the landowner to seek to review the designation. Now respondents here urge a ruling that review at the time of designation is premature. A landowner simply cannot be whipsawed in such a fashion.

when the agency is not empowered to consider all relevant criteria, is absurd.

If there is no "potential for . . . administrative solutions" (*Hodel* v. *Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 297 [1981]), because the agency lacks the power to grant relief or because it will not consider relevant factors,[5] then "failure" to seek an administrative solution cannot justify denial of judicial review on ripeness grounds.

## THE COURTS BELOW MISAPPLIED *PENN CENTRAL* AND OTHER TAKINGS PRECEDENTS OF THIS COURT

As appears from the municipal respondents' Counterstatement of Questions Presented, as well as the text of their brief, these respondents' position is that if preservation of theatre property is a legitimate government interest, and there exists a "causal relationship" between the means and the regulatory purposes, then under *Penn Central* constitutional inquiry is at an end.[6] The municipal defendants do not attempt to refute petitioners' demonstration that the courts below did not make the necessary takings analysis mandated by this Court's numerous decisions. Indeed, it is argued that

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5 In both *Lutheran Church* v. *City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974), and *Society for Ethical Culture* v. *Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980), the New York Court of Appeals decided the merits of as-applied takings claims under this very landmarks law—sustaining the contention in *Lutheran*, rejecting it in *Ethical Culture*—although no hardship applications had been made, because the "reasonable return" test considered under such applications would have been manifestly insufficient to determine whether a taking had occurred (the property owners were not-for-profit entities).

6 Both respondents' briefs repeatedly refer to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as "reaffirming" *Penn Central*. It did so only in the sense, conceded here by petitioners (and, for that matter, by the property owners in *Penn Central* [*see* 438 U.S. at 129]), that landmarking is a legitimate government goal. *See Nollan* at 834. The court in *Nollan* had no occasion to consider the points urged here.

the courts below did not have to do so.[7] This position makes clear and lucid the need for resolution of the issues framed by petitioners' Questions 1 and 2.

Certain miscellaneous arguments of the municipal respondents (some also urged by the intervenor respondent) bear brief comment: *First*: Respondents contend that petitioners did not adequately seek or preserve their right to an evidentiary hearing in the motion court. In this they plainly err, since under New York law the existence of a triable issue of fact, without a request, creates the right to a hearing (*Jerkins Truck & Equipment v. City of Yonkers*, 130 A.D.2d 576, 515 N.Y.S.2d 516 [1987]; *Gross v. Board of Education*, 94 A.D.2d 796, 463 N.Y.S.2d 47 [1983]; *Bay Ridge Diagnostic & Analytical Laboratory v. Smith*, 71 A.D.2d 889, 419 N.Y.S.2d 638 [1979]). Furthermore, the motion court here not only expressly refused to hold a hearing on a specific issue to which respondents refer, but even ruled, erroneously, that it was not empowered to hold one on *any* matter in an administrative review proceeding (see Pet. at 5). But even if the right to an evidentiary hearing were not preserved, the essential constitutional requirement of evaluating the relevant factors remained. Respondents cannot credibly argue that any court evaluated them, and, indeed, neither the motion court nor the Appellate Division purported to have done so.

The intervenor's assertion that the courts below allegedly indeed made the "ad hoc, factual inquiries" (*Penn Central* at 124) required by numerous decisions of this Court is simply wrong. The Appellate Division did not do it (see its one-

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7 It should also be noted that the municipal respondents err when they characterize (Mun. Res. Br. 20) the Appellate Division's opinion as construing *Penn Central* to be disposing of a *facial* attack on the ordinance. What the Appellate Division said (Pet. App. 7a), in discussing petitioners' *as-applied* challenge, was that "Since the Supreme Court in *Penn Central* . . . clearly ruled that *the application of* the landmarks law does not affect a taking of property, the constitutional challenge thereby is resolved" (emphasis supplied). The application of *Penn Central* to bar an as-applied Takings Clause challenge to a landmark designation, as the Appellate Division clearly here did, is precisely the issue presented in Question 1 of the petition herein.

sentence evaluation at Pet. App. 6a); and the motion court did not do it—indeed, it even refused to make a factual determination necessary to such consideration (Pet. App. 27a). The intervenor's argument that petitioners never made a factual showing is clearly erroneous, as the motion court (*id.*) and the Appellate Division (*id.* 4a) both discussed petitioners' showing,[8] without however, finding petitioners to be right or wrong.

*Second*: Respondents' reliance on the guidelines has already been dealt with (*see* Pet. 4 n.5). Respondents do not contend there is any legal requirement for the Commission to adhere to the guidelines, nor that any legal requirement prevents the guidelines from being revoked or abandoned. The guidelines at most tolerate only temporary, reversible modifications, which must be reversed at the owner's expense, and ultimately do not relieve the owner of the statutory requirement of maintenance of the landmark in an unaltered condition as at the moment of designation.

## RECONSIDERATION OF *PENN CENTRAL* IS APPROPRIATE

The petition herein suggested two reasons why reconsideration of *Penn Central* would be appropriate: (i)The majority opinion in *Penn Central* erred, as later developments proved, in its belief that the owner of the designated property was benefited in that the landmarking in question was pursuant to a comprehensive plan according an average reciprocity

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8 Compare the intervenor's assertion (Br. 15n) of petitioners' "mistaken and wholly unsubstantiated premise that interior landmarks burden theatre productions" with the motion court's discussion (Pet. App. 27a) of petitioners' affidavit by an expert "with eminent credentials in the field of theatre and stage design" that "interior designations and regulations are incompatible with the requirements of good and efficient theatre and stage design."

of advantage;[9] and (ii)that which the majority opinion saw as a comprehensive plan clearly does not meet the description.[10]

As to the first reason, the intervenor respondent asserts (Int. Res. Br. 26) that the proposition is incorrect, but offers neither authority of its own nor a counteranalysis of petitioners' authority. Of more significance is the position of the municipal respondents, who do not even deny that a comprehensive plan is wholly absent from New York City's landmarks ordinance, and instead argue (Mun. Br. 35-36) that the notion of a comprehensive plan is irrelevant. The municipal respondents thereby confirm what petitioners have been arguing, namely that the New York courts hold there is no comprehensive plan in the ordinance in question, because they do not believe (nor do the municipal respondents believe) that one is required. Since both the majority and the dissenters in *Penn Central* clearly thought such a plan was indeed necessary, the error in *Penn Central* is manifest.

As to petitioners' second point, that the "plan" discerned by the *Penn Central* majority in the ordinance (although it was never actually there) is contrary to the notion of a "comprehensive plan" as developed in the decisions of the highest courts of States throughout this country, neither brief in opposition seeks to argue that the spasmodic approach to landmarking provided for under the ordinance in question is anything but "piecemeal landmarking", which, like piece-

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9 Significantly, in its brief on the merits in *Penn Central*, the City expressly conceded (p. 19) that "The [New York] Court [of Appeals] . . . did not see individual designations as being pursuant to a comprehensive plan."

10 Respondents' fears as to the consequences of review of *Penn Central* are, to say the least, exaggerated. Zoning laws will not be called into question, because they universally already follow comprehensive plans. Numerous landmark laws also will not be called into question, for as Justice (now Chief Justice) Rehnquist noted in dissent in *Penn Central* (438 U.S. at 152n), "many States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results."

meal zoning, is antithetical to the notion of a comprehensive plan. Respondents do not eliminate the due process and equal protection concerns treated in a comprehensive plan (see Pet. i and 14) by merely limiting their briefs to takings jurisprudence.

## THE SPECIAL DEMOLITION PERMIT REQUIREMENT CONSTITUTES UNCONSTITUTIONAL REVERSE SPOT-ZONING

The appropriateness of respondents' ripeness arguments in opposition to petitioners' facial challenge to the Special Demolition Permit requirement has already been discussed (*supra*, p. 2). Moreover, respondents' contention (Mun. Res. Br. 38) that the City Planning Commission is permitted, but not required, to condition issuance of the permit on the applicant's agreement to allocate a certain portion of any new structure to entertainment-related uses, is flatly belied by the plain language of the Zoning Resolution (§ 81-742[c][2]], Pet. App. 82a), which makes the condition compulsory.

In response to the merits of petitioners' challenge, respondents seek to support the permit requirement by asserting that an alleged underlying comprehensive plan for the zoning ordinance saves it from illegality (Mun. Res. Br. pp. 39-40). This assertion fails for two reasons. *First*: An illegal spot-zoning amendment to an existing valid zoning ordinance is not saved merely because it is an amendment to an otherwise valid ordinance (*Chrobuck* v. *Snohomish County*, 78 Wash.2d 858, 480 P.2d 489 [1971]; *Heaney v. City of Oshkosh*, 47 Wis.2d 303, 177 N.W.2d 74 [1970]; *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 [1968]; *Speakman* v. *Borough of North Plainfield*, 8 N.J. 250, 84 A.2d 715 [1951]). *Second*: In traditional spot-zoning situations, the private property owner is benefited by the discriminatory zoning provision. The existence of a comprehensive plan ensures that the public is not victimized by conduct benefiting a private property owner unrelated to an overall legitimate public purpose. By stark contrast, in the reverse

spot-zoning situation, the private property owner suffers an economic loss in order that the public may receive some benefit. Thus, the existence of a comprehensive plan in the reverse spot-zoning context is meaningless, in that it provides no protection for the legitimate rights of the property owner and cannot justify the discriminatory conduct.

## CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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